The true view unquestionably is, that the law casts a public duty upon carriers, in a continuous line, to effect the transfer from each preceding to the succeeding line, in the shortest reasonable time, and holds the first carrier responsible as such, until this is effected; and so on throughout the line. It is therefore the duty of each preceding carrier to place the goods, immediately upon their arrival at the end of his route, in the custody of the next carrier, or at least to so tender them to such carrier as to secure a refusal to accept, which may render the second carrier responsible for the safety of the goods or for all loss or damage resulting from his refusal to accept them. We are not so sanguine as some, in regard to courts being able to discover such rules of law in regard to the duties of carriers, as to eliminate all uncertainties, and thus render the administration of the law hereafter a matter of plain sailing. This has been attempted a great many times, in regard to different subjects in the law, in the last two hundred years, and we are not sure, that the uncertainties of the law have essentially diminished in that time, but it is no doubt the duty of courts to adopt rules as easy and certain in their application as possible; but without departing from the true principles of legal justice. If certainty is sought, at the expense of principle, it will be found to have been obtained at too dear a rate. We do not object to the rule laid down in the principal case. It is substantially the same for which we have always contended; that a "continuous liability of carriers should be kept up throughout the line, which it seems to us is the true policy of the law on this subject:" 2 Railw. 75, p. 175, pl. 13. But we may be allowed to say, that we always feel some alarm, when we find any rule of law attacked mainly upon the ground of its uncertainty and the difficulty of its application. We regard it as a threatened invasion of established principles, for the sake of convenience.

I. F. R.

United States Circuit Court, Southern District of New York.

BEAN, ASSIGNEE, *v.* AMSINK ET AL.

Where a composition is made by creditors with a debtor, any security or advantage given to a particular creditor, not provided for in the terms of the composition and not disclosed, is void, both as to the other creditors and as to the debtor.

Creditors agreed to accept 70 per cent. in notes, payable at six, twelve and eighteen months. One of the creditors, in pursuance of a previous agreement, gave back the notes for the 70 per cent. and took notes for 50 per cent. payable in 60 days. These notes were paid but the debtor being unable to meet the six-month notes, was adjudicated a bankrupt. *Held*, that his assignee could recover back the money paid to the creditor on the sixty-day notes.

THIS was a bill in equity by the assignee in bankruptcy of Kintzing & Co., to recover back money paid defendants in fraud of a composition deed.

In February 1869 Kintzing & Co., of St. Louis, Mo., having become embarrassed, presented to their creditors a composition

deed by which the latter agreed to accept seventy per cent. of their claims, payable in equal instalments at six, twelve and eighteen months, and to be evidenced by the debtors' notes at those times. The deed was not to be binding on any one unless signed by all the creditors. Defendants, who were the largest creditors, made an agreement with Kintzing that the latter would after the deed was signed, discount his seventy per cent. notes by paying fifty per cent. of the debt, one-third in cash, and the remainder in two notes at thirty and sixty days. Defendants also stipulated that they should not sign until after all the other creditors had done so. After the deed had been signed by a very large majority of the creditors both in number and amount, but not by all, defendants through their agents Reuss & Co., signed it; no other creditor signed after defendants; and the agreement was carried out between defendants and Kintzing. Defendants' notes were paid in April and May 1869, but when the first of the composition notes came due in August 1869 Kintzing was unable to meet them, and on August 21st he made an assignment under the laws of Missouri, for the benefit of all his creditors. Subsequently an adjudication of bankruptcy was made and an assignment to the present plaintiff of all the estate which Kintzing had on the 17th day of September 1869. The assignee brought this suit to recover the money paid by Kintzing to defendants.

Edward B. Merrill, for plaintiff.

Augustus F. Smith, for defendants.

BLATCHFORD, J., after stating the facts in detail.—The answer denies that an agreement was made which was fraudulent, or made with an intent, on the part of the defendants, to deceive or cheat the other creditors of Kintzing, or with a view on their part to obtain a fraudulent preference over the said other creditors. It admits that subsequently to the 15th of February 1869, Reuss & Co., by the authority of the defendants, signed, in the firm name of the defendants, the compromise agreement. It denies that any money paid to the defendants vested in the plaintiff; it avers that the defendants received the payments believing, after the compromise agreement was signed, that Charles S. Kintzing & Co. were solvent and able to pay all their then debts; that the other creditors also so believed; that, in consideration of the

payments, they discharged Charles S. Kintzing & Co. from all liability, which, under the compromise agreement, amounted to $22,786.15; that the transaction can in no aspect be questioned by the plaintiff in consequence of its being contrary to public policy in respect to its infringement of the terms of the compromise agreement; that, at the time of the filing of the petition in bankruptcy, Lindsley was a partner of Kintzing, under the firm name of Charles S. Kintzing & Co., and the debts claimed by the creditors by whom said petition was filed were contracted by said firm, so composed, the members of which were, both of them, liable, as such partners, to said creditors on said debts, at the time the petition was filed and afterwards; that Lindsley was not made a party to the bankruptcy proceedings, or adjudged bankrupt, although he was alive and resided in the United States; that, therefore, the court in Missouri never acquired jurisdiction of the proceedings so as to adjudge Kintzing to be bankrupt, and that the plaintiff, by his appointment as assignee, never acquired any title to any of the estate of said firm of Charles S. Kintzing & Co., or to the claim or cause of action set forth in the bill.

The principle upon which the plaintiff seeks a recovery in this case is well settled. Such a transaction as that in which the defendants engaged was a constructive fraud on the other creditors. Those who entered into the composition agreed, by its terms, to accept the seventy per cent. in full payment and satisfaction of their claims, relying on the statement which had been exhibited to them of the books, assets, and effects of their debtors, and, in substance, constituting Kintzing their trustee, to take such assets and effects, and settle up the business, by applying such assets and effects to the payment of the compromise notes. Such an arrangement was necessarily based on the good faith of all the creditors entering into the composition, in their dealings with the debtors and with each other, and there could be no good faith, either towards the debtors or towards the other creditors, when one creditor obtained, by a secret arrangement with the debtors, which amounted to coercion and duress upon the debtors, the advantage of an early, certain, cash payment of one-half of his debt which resulting in making the debtors unable to pay to the other creditors any part of the seventy per cent. for which they bargained. They supposed the favored creditors were acting in good faith, in agreeing to the same terms they agreed to;

whereas, it turns out, that such favored creditors had been bribed to hold themselves out as agreeing to such terms. Secret agreements of that kind are held void, both by courts of law and courts of equity, and are not enforced, even against the assenting debtor, or his sureties, or his friends. Public policy, and the interests of unsuspecting and deceived creditors, forbid the enforcement of such secret agreements. And it makes no difference whether threats or oppression were used to induce the debtor to consent to the secret agreement, or whether he was merely a volunteer, offering his services, and aiding in the intended deception: 1 Story's Eq. Juris., secs. 378, 379, and cases there cited; *Clarke* v. *White*, 12 Peters 178, 199; May on Fraudulent Conveyances 86, and cases there cited; *Russell* v. *Rogers*, 10 Wendell 473, 479; *Wiggin* v. *Bush*, 12 Johnson 306, 309; *Bean v. Brookmire*, 1 Dillon 151, 154; *Dandgleish* v. *Tennent*, Law Rep. 2 Q. B. 48, 54. Not only are such secret agreements not enforced, but money paid under them is allowed to be recovered back by the debtor, as having been obtained in violation of the principle of public policy, and affirmative relief is given to the debtor against such agreements, even where they are not forbidden by an express statute: *Smith* v. *Bromley*, Doug. R. 696, note; *Jackman* v. *Mitchell*, 13 Vesey 581; *Wood* v. *Barker*, Law Rep. 1 Eq. Cases 139. Nor is it material whether the secret agreement gives to the favored creditor a larger sum, or an additional security or advantage: *Eastabrook* v. *Scott*, 3 Vesey 456; *Constantien* v. *Blache*, 1 Cox's Ch. Cases 287. The case of *Cullingworth* v. *Loyd*, 2 Beavan 385, shows that, although there is no general meeting of creditors, nor any agreement entered into by the creditors generally, yet, if a proposition is made to the creditors at large to pay them all a composition on certain terms, no creditor can ostensibly accept such composition and sign the deed which expresses his acceptance of the terms, and at the same time stipulate for or secure to himself a peculiar and separate advantage which is not expressed upon the deed. In *Leicester* v. *Rose*, 4 East 372, 383, it is said that the fraud in such a case may consist in putting the favored creditor in a better situation than the other creditors; that it is not necessary he should stipulate to receive more money than the others, but the fraud may consist in receiving that which is meant to procure him more money, namely, a better security for the same sum;

and that it is a fraud on the creditors at large for a person to hold out that he will come in under the general agreement, by signing the deed when presented to him separately, and then to stipulate for a further partial benefit to himself.

The leading cases on the subject are reviewed in *Breck* v. *Cole*, 4 Sandf. S. C. R. 79, and the conclusion is thus stated: "It is the clear and inevitable result of the decisions that, where a composition is made with creditors, every security given to a particular creditor, not provided for in the terms of the deed, and not disclosed, is void, as a fraud upon the creditors from whom it is concealed, and, where it is taken from the debtor himself, as a condition of his discharge, is void, upon the ground of duress as well as of fraud." It is also said in that case, "that it makes no difference that the secret agreement does not have, and cannot have, the effect of depriving the other creditors of any portion of the amounts they had agreed to receive; that it is sufficient, if a fact is concealed which it was material for them to know, and the knowledge of which might have prevented them from assenting to the composition; and that, upon a composition deed, all the parties are supposed to stand in the same situation, and if there is any one who refuses to do so, he must announce it at the time, it being impossible to say that those who signed the deed in the confidence that, under it, the rights of all would be equal, would have signed it at all if it had been known to them that a better security was to be given to any one creditor than that which, by the terms of the deed, all had consented to take." These views are approved by Judge WOODRUFF, in *Carrol* v. *Shields*, 4 E. D. Smith 466. The case of *Pinneo* v. *Higgins*, 12 Abb. Pr. Rep. 334, is very much like the present one. There the favored creditor held out to the debtor that he would unite in the composition if the other creditors did; when all the other creditors had signed, he sought to obtain better terms, and then agreed to sign if those terms were complied with, and finally did sign because they were complied with. In that case, it was urged that no creditor was induced to sign because the favored creditor had signed. But the court held that "it was of no consequence whether the name of the favored creditor was the first that was signed to the composition agreement, or the last; that he, by signing, entered into an agreement with the other creditors, as well as with the debtor, and that the separate agreement was

equally void, whether made after all the other creditors had signed, or whether before or after the creditor who made it had signed."

It is contended, for the defendants, that the present case does not fall within the principles thus settled, because it was expressly provided in the composition agreement, that it was not to be binding on any one unless agreed to and signed by all the creditors, and it was not signed by all the creditors; and, because the defendants bargained for fifty per cent. only of their claim, and threw away twenty per cent. of it; and because Reuss & Co. were authorized to sign only after all the other creditors had signed, and there were creditors who did not sign at all, and such condition was not waived either by Reuss & Co. or by the defendants. The ground taken is that, as the composition agreement never had any binding force, as against the defendants, the payment to them of fifty per cent. of their debt did not violate any rights of the other creditors under the compromise. The difficulty with this view is, that it overlooks the true relations of the defendants to the other creditors. The defendants and Reuss & Co. supposed, as is evident from the letter of the 16th of March 1869, from the latter to the former, that all the other creditors had signed. They, therefore, acted on that view in taking the fifty per cent. and pretending to assent to the compromise terms, and concealing from the other creditors the special arrangement. So, too, the other creditors, inasmuch as the deed, by its terms, provided that all the creditors must sign before the composition should be binding, had the right to suppose, in receiving their composition notes, that all the creditors had signed, and that all were to receive like notes, and nothing further. They acted on that view in taking their notes. Hence, not only must the agreement, for the purpose of this case, be regarded as having been signed by all the creditors, but each creditor has a right to stand as if the defendants had signed before him. Nor does it make any difference that there may not, in fact, have been any manual tradition of the compromise notes to Reuss & Co. or to the defendants. The letter of the 8th of March 1869, from the defendants to Reuss & Co. states expressly that the fifty per cent. is to be received as a "discount" of the compromise notes, and that those notes are to be discounted on the signing of the agreement by Reuss & Co. Therefore, the signing the receipt of the

compromise notes, and their "discount," were to be simultaneous acts. And the defendants, having accepted the "discount," and retained it under that arrangement, are estopped from saying that the compromise notes were not received by them, or that Reuss & Co. had no authority to sign the agreement, or that it was not binding because all the creditors did not sign it. The defendants did not treat separately in respect of their debt, but as a part of the general creditors, all of whom were, as they knew, to be invited to accede to the same terms.

Nor is there any force in the fact that the defendants obtained only fifty per cent. of their claim instead of seventy per cent. By obtaining the fifty per cent. they substantially exhausted a large part of the resources of the debtors. They intended to make it sure that they should obtain the whole of their fifty per cent. before any of the compromise notes, which the other creditors were to receive, should fall due, and they further intended to make it sure, by signing last, that no creditor should be left free to proceed against the debtors on his original claim, so as to prevent the payment of the whole of the fifty per cent. It is to be assumed that other creditors would have preferred such an arrangement as the defendants made. At all events, it is to be assumed that others who signed would not have signed had they known of the private arrangement with the defendants, which was to strip the debtors of a large part of their means for paying the six months' compromise notes. The amount of such notes actually given was $24,768.39. The amount of the defendants' first compromise note, at seventy per cent., would have been $7595.38. Before half of the six months had elapsed the defendants had exacted from the debtors $16,275.83. The position of the creditors who have been defrauded by the private agreement would have been no different from what it is if all the creditors had signed the compromise agreement; or if, all signing it, the defendants had not signed last; or if, only a part signing it, including the defendants, the defendants had not signed last; such position, too, is the same as it would have been if, all the creditors signing the compromise agreement, the defendants had signed it first; or, only a part signing it, including the defendants, the defendants had signed it first.

The suggestion that, if the compromise at seventy cents had been carried out, Kintzing & Co. were solvent, has no force, ex-

cept to show that the defendants rendered it, through their fraud, impossible that the compromise should be carried out.

It being clear, therefore, that the transaction was a fraud on the creditors, the right of the plaintiff to receive back the money for such creditors is equally clear, whether the money could or could not be recovered back by the debtor. The fourteenth section of the Bankruptcy Act especially vests in the assignee all property conveyed by the bankrupt in fraud of his creditors, and authorizes him to sue for and recover the same. This applies to conveyances fraudulent at common law, and to transfers of property, such as that in the present case: *Knowlton* v. *Moseby*, 105 Mass., 136; *Bean* v. *Brookmire*, 1 Dillon 151, 154. It is contended that the bankruptcy proceedings were against Kintzing alone, and not against Lindsley also, and not against the firm; that the plaintiff is the assignee only of Kintzing, individually, and not of the assets of the firm; that the copartnership was never dissolved; that the plaintiff does not represent the interest of Lindsley in the claim sought to be recovered in this suit; and that Lindsley has an interest in it, which did not pass to the plaintiff. It is apparent, from the evidence, that the firm was regarded as dissolved by all parties concerned—by Kintzing, by Lindsley, and by the creditors, including the defendants—and that the assets and the effects of the firm were regarded as being put into Kintzing's hands, in trust, to settle up the business, as the appointee of the creditors, and pay the compromise notes. Kintzing passed into the hands of the state assignee all that was left of such assets, as being part of the estate of Kintzing. From the state assignee they passed to the plaintiff as the assignee of Kintzing, as part of the estate of Kintzing. But there is another view of the matter. The composition deed does not appear to have been assented to in any manner by Lindsley. He is not named in it, nor was he, so far as appears, a party to it, potentially. The deed is made between "Charles S. Kintzing & Co." and *his* creditors. There does not seem to have been any authority, so far as Lindsley was concerned, to sign the firm name to the compromise notes, so as to bind him by them. The compromise notes, therefore, signed by Kintzing with the firm name, were the individual notes of Kintzing. Having given them, he was to have the assets to administer, with which to pay them. This was the view of the creditors and of the Bankruptcy Court.

The petition states that the petitioners are creditors of Kintzing, a member of the late firm, and that his debts to them are two of those six months' compromise notes, signed in the name of Charles S. Kintzing & Co., but given by Kintzing, and that he committed all of the alleged acts of bankruptcy, one among them being the preferential payment by him to the defendants, as creditors of his, of the moneys before mentioned. And the prayer of the petition is that Kintzing, so doing business as Charles S. Kintzing & Co., may be declared bankrupt. The defendants, as before shown, having really accepted the compromise notes and received the fifty per cent. as a discount of those notes, as well as all the other compromise notes, being really only the individual notes of Kintzing, and it appearing that the moneys paid to the defendants were paid by Kintzing out of the general funds of Kintzing, it follows that although those funds may have been, in part, the proceeds of the assets of the former firm, and although it may appear, on a calculation, that Kintzing was a debtor to such former firm in respect to the assets he received and converted into money to an amount sufficient to cover the payments to the defendants, yet the claim sought to be recovered in this suit, is a claim belonging to the estate of Kintzing, and recoverable by the plaintiff as his assignee. How the plaintiff shall distribute the amount of the recovery under the direction of the Bankruptcy Court, as between persons who were creditors of the former firm (including those who received, and those who did not receive compromise notes), and persons who, through creditors of Kintzing, were never creditors of the former firm, is a question not involved in this suit.

There must be a decree for the plaintiff for the several amounts of money paid to the defendants, with interest and costs.

The foregoing case does not seem to involve any new principle of law, or any of very difficult application. And still it cannot fail to move the decided approbation, if not the admiration, of all lovers of simple, straightforward justice. We know, indeed, that even that kind of justice may be reached at too great expense, when the established principles of the law are even apparently set aside, or treated with a sort of ill-disguised defiance or contempt. It is important, perhaps indispensable, in order to maintain a salutary respect for the courts, without which it soon becomes impossible to maintain order in society, except by the bayonet, that their decisions should rest upon recognised principles of law as well as justice, and should not appear to disregard the force of established precedents, for any cause, however high or holy. Hence it becomes important that the judges should possess such familiarity with the jurisprudence of the country,

that their judgments will appear to rest upon well recognised judicial convictions rather than upon mere bald instincts, however pure or patriotic. The judge, in order to command the willing acquiescence of all, should appear to act from the necessary compulsion of established principles, rather than from any personal and private speculations, however wise or far-seeing. We are not sure, that the present case calls for the application of this rule to any great extent, or indeed in any sense whatever. But, on first impression, it would not be wonderful if some should consider that it had carried the principle upon which it professes to go, somewhat further than the former cases. This impression, we apprehend, if it exist anywhere, will appear, upon careful review of the former decisions, to be without any just foundation. The apparent discrepancy, if any, will be found to result from what we have before had occasion to regret, in our notes to cases, that the reasons assigned for forming the decisions, had reference too exclusively to the facts in the particular case, and did not sufficiently bring out the general principles upon which the entire class of cases proceeds. That is eminently true of the best writers and the most cautious judges, in discussing the grounds upon which frauds upon composition with creditors may be committed. A considerable number of judges and writers seem to imply, that the fraud consists mainly in violating the confidence upon which the particular creditor *had influenced other creditors to come into the arrangement*. Mr. Justice STORY, 1 Eq. Jur. § 378, seems to place the enormity of the fraud upon the fact of having "thus decoyed other innocent and unsuspecting creditors into signing deeds of composition." * * * "The very circumstance that other creditors, *of known reputation and standing, have already become parties* to the deed, will operate as a strong inducement to others to act in the same way." So also many of the cases upon this subject seem to rest upon the same view: *Fawcett* v. *Gee*, 3 Anst. 910; *Wells* v. *Guling*, 1 B. & B. 447; *Leicester* v. *Rose*, 4 East 372; *Cullingworth* v. *Lloyd*, 2 Beav. 385; *Wood* v. *Roberts*, 2 Stark. 417.

But a full examination of the decided cases will show, very clearly, that the gist of the fraud, in this class of cases, does not consist mainly in the deceptive inducement held out to other creditors to enter into the composition. For it has been held that while any secret agreement by which one creditor obtains additional security, although for no greater sum than the others, is void, *Ex parte Sadler & Jackson*, 15 Ves. 52; this will be equally so, although made after the creditors had executed the deed of composition: *Mawson* v. *Stock*, 6 Ves. 300; *Jackman* v. *Mitchell*, 13 Id. 581. And it will have the same effect, that the additional sum is paid by the friends of the debtor, without his knowledge, and the money may be recovered back by the debtor, if compelled to pay it by any transfer of the securities to *bonâ-fide* holders: *Bradshaw* v. *Bradshaw*, 9 M & W. 29; *Turner* v. *Hoole*, D. & R. N. P. C. 27; *Smith* v. *Cuff*, 6 M. & S. 160. And not only the additional security will be held void at law, but the creditor who takes it will be enjoined in a court of equity from bringing suit upon it: *Constantine* v. *Bloche*, 1 Cox 287. And not only this, but the taking of such security avoids the whole compromise, as to such creditor, and he cannot recover upon the securities rightfully given under the compromise, even when he has not obtained the amount in any other manner: *Howden* v. *Haigh*, 11 Ad. & Ellis 1033; *Knight* v. *Hunt*, 5 Bing. 432. And even when a particular creditor had fairly obtained a preceding security for part of his debt, he cannot retain this, or accept one in lieu of it, in addition to what the other creditors obtain under the compromise, unless he make it known to the other creditors, at the

time, and they assent: *Cullingworth* v. *Lloyd*, 2 Beavan 385; *Leicester* v. *Rose*, 4 East 372; *Coleman* v. *Waller*, 3 Y. & J. 212. And it has been held that the assignee in bankruptcy may recover back any additional sum so secretly taken by any creditor, although the stipulated compromise has not been carried into effect by payment of the money: *Alsager* v. *Spalding*, 4 Bing. N. C. 407.

And it has been held that courts of equity will decree the surrender of securities, so obtained, even upon bills on behalf of *participes criminis* on the ground of public policy: *Attorney-General* v. *Griffith*, 13 Ves. 565. And this seems to point to the true ground upon which redress is afforded by courts of equity in this class of cases. It is a species of fraud, in violation of very special confidence and trust, and where there is very exceptional temptation and opportunity for committing such fraud, and therefore the greater necessity of stringent demands for the utmost good faith, the *uberrima fides* of the civil law. Much the same demands are made by courts of equity in cases of suretyship, and by all courts in matters of insurance. And this partakes partly of the nature both of suretyship and of insurance.

There are many grounds upon which a composition with creditors may be said to be avoided, by one of the creditors departing from the terms of the arrangement and obtaining different terms for himself, which we may safely suppose he regards as better terms than those furnished by the agreed compromise.

1. It may be upon the ground that the basis of the composition did not present the whole truth of the debtor's means—either that he had more ability to pay than he disclosed; in which case the compromise would be invalid because obtained by false representation, and thus justify the creditors suing for their whole debts; *Reynolds* v. *French*, 8 Vt. 85; or that he had less than he represented, so that by obtaining better security, or payment in advance, the creditor would, as in the present case, deprive the other creditors of their equal share in the assets, which would defeat the composition in another essential particular.

2. If there is any guaranty by third parties, of the sums agreed to be paid under the composition, the secret drawing off of the common fund relied upon to indemnify the sureties, whether in a larger amount or at an earlier day than the stipulated arrangement, will operate as such a fraud upon the sureties, as to avoid the contract by which it is attempted. The cases are numerous to this effect: *Pidcock* v. *Bishop*, 3 B. & C. 605; *Kearsley* v. *Cole*, 16 Law J. Exch. 115; *Calvert* v. *London Dock Co.*, 2 Keen 338.

3. Where the creditors, as is the more common case, rely upon the debtor's assets, placed in his hands or that of some other as trustee, to be disposed of to meet the terms of the composition, the attempt of one creditor to obtain more than his just share, or in a different mode, is a fraud upon the trust and a diversion of the trust fund, when carried into effect, and a court of equity will either enjoin the attempt or restore the fund when actually diverted.

In all these modes of departure from the composition, there is fraud and breach of trust or confidence, giving equity jurisdiction, and the extent and nature of the redress, no doubt, rest largely upon principles of established public policy, and the peculiarly confidential nature of the transaction, and the absolute necessity of the utmost good faith and fair dealing. The remedy under the present bankrupt law would seem most unquestionable. The provision of the 14th section seems to have been framed for precisely such cases. The American cases have followed the English, we think, in all essential particulars, which are sufficiently referred to in the foregoing opinion. I. F. R.